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 15 INTERNET CORPORATION FOR ASSIGNED
 16 NAMES AND NUMBERS

17 UNITED STATES DISTRICT COURT
 18 CENTRAL DISTRICT OF CALIFORNIA

19 DOTCONNECTAFRICA TRUST,
 20 Plaintiff,

21 v.

22 INTERNET CORPORATION FOR
 23 ASSIGNED NAMES AND
 24 NUMBERS, *et al.*,
 25 Defendants.

Case No. CV 16-00862-RGK(JCx)

Assigned for all purposes to the
 Honorable R. Gary Klausner

**INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 NUMBERS' OPPOSITION TO
 MOTION FOR LEAVE TO
 AMEND**

**[Declaration of J. LeVee and
 [Proposed] Order filed concurrently
 herewith]**

Hearing Date: November 7, 2016
 Hearing Time: 9:00 a.m.
 Courtroom: 850

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1 **I. INTRODUCTION**

2 Plaintiff DotConnectAfrica Trust (“Plaintiff”) has filed a motion for leave to
3 file a second amended complaint (“Motion”) long after the August 1, 2016 deadline
4 to amend the pleadings set forth in this Court’s scheduling order (“Scheduling
5 Order,” ECF No. 110). Plaintiff’s Motion seeks to add a Fifth Amendment
6 procedural due process claim (“Due Process Claim”) against the Internet
7 Corporation for Assigned Names and Numbers (“ICANN”). Plaintiff does not
8 contend that it suddenly discovered new facts that support the addition of the Due
9 Process Claim (after the deadline to do so), nor could it since all the materials
10 Plaintiff cites were widely available on the Internet prior to the amendment
11 deadline, as well as prior to the filing of the lawsuit. Rather, Plaintiff merely states
12 that it did not “contemplate” the cause of action until now. (Mot. at 6.) Moreover,
13 the proposed Due Process Claim is blatantly frivolous, as it relies upon the
14 nonsensical notions that: (1) Plaintiff has a constitutional right to operate the new
15 gTLD .AFRICA; and (2) ICANN is an agent of the U.S. Government.¹ Nothing in
16 the Proposed Second Amended Complaint (“PSAC”) or the Motion plausibly
17 suggests any constitutionally cognizable property or liberty interest in the right to
18 operate .AFRICA (as there is none), rendering the proposed Due Process Claim
19 defective at the outset. Further, no set of facts could be pled to show that ICANN is
20 a governmental actor, because it is not.

21 The real reason Plaintiff seeks to amend its First Amended Complaint
22 (“FAC”) to add the Due Process Claim is to artificially create subject matter
23 jurisdiction in a desperate bid to keep this action in federal court, since ZA Central
24 Registry (“ZACR”) as an indispensable party destroys the Court’s diversity
25 jurisdiction. (See ECF No. 137 at 4 n.2.) Such gamesmanship and manipulation of

26
27 ¹ On September 28, 2016, ICANN’s counsel informed Plaintiff’s counsel that
28 moving to amend the FAC to add a due process claim may warrant sanctions under
Fed. R. Civ. P. 11. ICANN reserves all rights in that regard.

1 the pleading process cannot be permitted. There is no “good cause” to amend the
2 Scheduling Order, as Fed. R. Civ. P. 16(b) (“Rule 16(b)”) requires. In addition,
3 leave to amend the FAC is not warranted under Fed. R. Civ. P. 15(a) (“Rule 15(a)”)
4 because: (1) Plaintiff brings the Motion in bad faith; (2) Plaintiff unduly delayed
5 bringing the Motion; (3) granting the Motion would significantly and severely
6 prejudice ICANN in this action; (4) the proposed amendment is futile because the
7 claim fails as a matter of law; and (5) Plaintiff has already amended its complaint.
8 *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

9 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**²

10 Plaintiff filed this suit against ICANN on January 20, 2016, in Los Angeles
11 County Superior Court. (ECF No. 1.) After the Superior Court denied Plaintiff’s
12 request for a temporary restraining order, ICANN timely removed the case to the
13 district court, invoking diversity jurisdiction. (ECF No. 1.)

14 On February 26, 2016, Plaintiff filed its FAC, adding ZACR as a defendant.
15 (ECF No. 10.) Therein, Plaintiff asserted claims for breach of contract, intentional
16 and negligent misrepresentation, fraud and conspiracy to commit fraud, unfair
17 competition, negligence, intentional interference with contract (against ZACR only),
18 confirmation of the independent review process (“IRP”) declaration (“Declaration”)
19 as well as three claims for declaratory relief. (ECF No. 10.) The underlying
20 allegation of each of the claims is that ICANN wrongly did not comply with its
21 own procedures in evaluating Plaintiff’s application to operate the new
22 gTLD .AFRICA and did not comply with the Declaration. (ECF No. 10.)

23 On March 1, 2016, Plaintiff moved for a preliminary injunction, which this
24 Court granted on April 12, 2016. (ECF Nos. 16, 75.) On April 26, 2016, ZACR
25 moved to dismiss the FAC as to ZACR for failure to state a claim, which this Court
26

27 ² As the Court is familiar with Plaintiff’s allegations (*see* ECF No. 75 at 1-2),
28 ICANN includes only the background relevant to resolving this Motion.

1 granted on June 14, 2016. (ECF Nos. 80, 112.) While its motion to dismiss was
2 pending, ZACR also moved for reconsideration of the preliminary injunction
3 order—a motion in which ICANN joined. (ECF Nos. 85, 113.)

4 On June 7, 2016, this Court entered the Scheduling Order setting forth an
5 August 1, 2016 deadline to amend the pleadings, a November 30, 2016 discovery
6 cutoff, and a February 2017 trial date. (ECF No. 110.)

7 On June 20, 2016, the district court denied the motion to reconsider the order
8 granting the preliminary injunction. (ECF No. 113.)

9 On July 29, 2016, ICANN moved for a protective order limiting the scope of
10 the Fed. R. Civ. P. 30(b)(6) (“Rule 30(b)(6)”) deposition notice Plaintiff served on
11 ICANN (“Motion for Protective Order”). (ECF No. 121-1.) Among the topics
12 ICANN asked Magistrate Judge Chooljian to eliminate were four concerning the
13 “IANA functions contract” that ICANN had previously entered into with the U.S.
14 Government. (See ECF No. 121-3, Ex. 1 at 14.) ICANN argued those topics were
15 wholly irrelevant to the lawsuit. (ECF No. 121-1 at 15.) Magistrate Judge
16 Chooljian agreed, and granted a protective order “prohibiting inquiry” into those
17 topics. (ECF No. 127 at 2.)

18 On August 1, 2016, ZACR moved to intervene in the action, which Plaintiff
19 opposed. (ECF No. 122, 128.) On September 22, 2017, this Court ordered “the
20 parties and ZACR” to file supplemental briefing on the “discrete issue” as to
21 whether ZACR “is an indispensable party as to Plaintiff’s Tenth Claim for
22 Declaratory Relief[.]” (ECF No. 134.) In its supplemental brief, filed
23 September 27, 2016, Plaintiff stated: “DCA intends shortly hereafter to file a
24 motion for leave to amend to add a Fifth Amendment claim for violation of due
25 process against ICANN as an entity contracted with the U.S. government to provide
26 a public benefit; *if DCA amends the complaint to add this claim, the Court will*
27 *have federal question jurisdiction over the matter, mooting the question of ZACR’s*
28 *indispensability.*” (ECF No. 137 at 4 n.2 (emphasis added).) That same day,

1 September 27, 2016, Plaintiff called ICANN to meet and confer regarding the
 2 instant Motion. (LeVee Decl. ¶ 2.)³ ICANN responded in writing on
 3 September 28, 2016, reserving its rights to seek sanctions in connection with any
 4 motion seeking leave to add a claim that posits ICANN is a governmental actor
 5 based on multiple grounds, including that courts have already determined that
 6 ICANN is *not* a governmental actor. (LeVee Decl. ¶ 2, Ex. 1.)

7 On October 4, 2016, more than two months after the Scheduling Order's
 8 deadline to amend the pleadings, Plaintiff filed the Motion seeking leave to amend
 9 the FAC to add the Due Process Claim. (ECF No. 138.)

10 **III. LEGAL STANDARDS**

11 Pursuant to Fed. R. Civ. P. 16(b), after the date set forth in a scheduling order
 12 to amend the pleadings has passed, the deadline may be modified only for “good
 13 cause.” Fed. R. Civ. P. 16(b). “Rule 16(b)’s ‘good cause’ standard primarily
 14 considers the diligence of the party seeking the amendment.” *Johnson v. Mammoth*
 15 *Recreations*, 975 F.2d 604, 609 (9th Cir. 1992).⁴ If the moving “party was not
 16 diligent, the inquiry should end” and the motion must be denied. *Id.*

17 If a plaintiff can demonstrate the requisite “good cause” under Rule 16(b) to
 18 amend the scheduling order, it must then demonstrate that the amendment to the
 19 pleading is warranted under Fed. R. Civ. P. 15(a)(2), which provides that “a party
 20 may amend its pleading only with the opposing party’s written consent or the

21 _____
 22 ³ Plaintiff’s Motion erroneously states that it met and conferred with ICANN
 23 on “September 7, 2016” (ECF No. 138 at 1 (emphasis added)). Since this statement
 is completely untrue, ICANN assumes it is a typographical error.

24 ⁴ “[T]o demonstrate diligence under Rule 16’s ‘good cause’ standard, the
 25 movant may be required to show the following: (1) that she was diligent in assisting
 26 the Court in creating a workable Rule 16 order . . . ; (2) that her noncompliance
 27 with a Rule 16 deadline occurred or will occur, notwithstanding her diligent efforts
 28 to comply, because of the development of matters which could not have been
 reasonably foreseen or anticipated at the time of the Rule 16 scheduling
 conference, . . . ; and (3) that she was diligent in seeking amendment of the Rule 16
 order, once it became apparent that she could not comply with the order.” *Jackson*
v. Laureate, Inc., 186 F.R.D. 605, 608 (E.D. Cal. 1999) (citations omitted).

1 court’s leave.” Fed. R. Civ. P. 15(a)(2). Leave to amend “is not to be granted
 2 automatically.” *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990).
 3 Instead, “granting leave to amend is subject to several limitations,” which include:
 4 “(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of
 5 amendment, and (5) whether plaintiff has previously amended its complaint.”
 6 *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). Of these
 7 factors, “prejudice to the opposing party carries the greatest weight.” *Bever v.*
 8 *CitiMortg., Inc.*, No. 1:11-cv-01584-AWI-SKO, 2014 U.S. Dist. LEXIS 54390, at
 9 *26 (E.D. Cal. Apr. 17, 2014) (citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316
 10 F.3d 1048, 1052 (9th Cir. 2003)).

11 **IV. ARGUMENT**

12 **A. THE MOTION MUST BE DENIED UNDER RULE 16** 13 **BECAUSE THERE IS NO GOOD CAUSE TO AMEND THE** 14 **SCHEDULING ORDER.**

15 The “good cause” requirement of Rule 16 considers the diligence of the party
 16 seeking to amend the scheduling order. Therefore, Plaintiff bears the burden of
 17 demonstrating that it has acted diligently. *Johnson*, 975 F.2d at 609; *Jackson v.*
 18 *Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999). Plaintiff cannot carry its
 19 burden of showing diligence because “the allegations Plaintiff seeks to add to the
 20 complaint are not comprised of newly discovered facts, but *facts that have already*
 21 *been known . . . or facts that Plaintiff has known, or should have known* since the
 22 inception of the lawsuit or at the time he amended his complaint . . . but failed to
 23 raise.” *Bever*, 2014 U.S. Dist. LEXIS 54390, at *24–25 (emphasis added).

24 Plaintiff’s conduct in this litigation shows that it was well aware of all facts it
 25 claims are relevant to the Due Process Claim long before the August 1 deadline.

26 *First*, Plaintiff does not even attempt to argue that it was unaware of the
 27 allegedly relevant facts prior to the August 1, 2016 deadline to amend the pleadings.
 28 Instead, Plaintiff merely states without explanation that it “did not contemplate”
 bringing the Due Process Claim until some unidentified time “after the scheduling

1 order was entered.” (Mot. at 6.) Plaintiff also provides no reason why it did not
2 investigate, or could not have investigated, all of the alleged relevant facts earlier.
3 In fact, the Motion is not supported by *any* attorney declaration that could support
4 these vague allusions to the timing of Plaintiff’s alleged investigation.

5 The first hint Plaintiff provided that it would move to amend the pleadings
6 was on September 27, 2016, in its supplemental brief regarding whether ZACR is
7 an indispensable party, nearly two months after the Scheduling Order’s deadline to
8 amend the pleadings. (ECF No. 137 at 4 n.2.) Plaintiff has not suggested any
9 reason why it could not have investigated the facts it claims are relevant to its
10 proposed amendments long before that date. As such, Plaintiff has not carried its
11 burden of showing that it was diligent in investigating those facts. *See Bank of*
12 *Haw.*, 902 F.2d at 1388 (affirming denial of leave to amend because delay in
13 proposing amendment was “inexplicable and unjustified”); *Laureate, Inc.*, 186
14 F.R.D. at 608 n.4 (denying motion for leave to amend complaint because “the
15 parties and/or their lawyers are expected to do ‘investigative homework’ that is
16 reflected in their status reports concerning plans for disclosure of expert witnesses,
17 discovery, and amendment to pleadings”).

18 *Second*, Plaintiff’s counsel’s on-the-record statements in this matter show
19 that Plaintiff knew of all the allegedly relevant facts long before the August 1, 2016
20 deadline. Specifically, on August 23, 2016 (three weeks after the Scheduling
21 Order’s deadline to amend the pleadings), the hearing on ICANN’s Motion for
22 Protective Order took place before Magistrate Judge Chooljian. Four topics
23 included in the Rule 30(b)(6) deposition notice Plaintiff served on ICANN on May
24 20, 2016 (*see* ECF No. 121-2 ¶ 2) sought testimony regarding a contract between
25 ICANN and the U.S. Government. (ECF No. 121-3, Ex. A at 14; LeVee Decl., Ex.
26 2 [Hrg. Tr. at 12:21-23].) Magistrate Judge Chooljian deemed these topics “a
27 burdensome fishing expedition about potential transparency and accountability and
28 failure to follow guidelines in connection with a *contract that is not at issue*. . . .

1 any relevance in the Court’s mind is outweighed by the burden required to prepare
2 a witness to testify regarding the Department of Commerce contract.” (LeVee
3 Decl., Ex. 2 [Hrg. Tr. at 12:21-13:8] (emphasis added).)

4 Had Plaintiff been investigating whether a Due Process Claim was viable,
5 Plaintiff would have stated that it was doing so, as the contracts referenced in the
6 deposition topic might have been relevant to that proposed claim. Plaintiff did
7 nothing of the sort. Instead, Plaintiff merely stated that ICANN’s contracts with the
8 U.S. Government might be relevant to show ICANN not following its own rules:

9 ICANN has presented arguments in its papers that the rules in its
10 Guidebook are discretionary, that it does not have to follow its
11 own rules in the Guidebook, and *our point in bringing in these*
12 *contracts is that ICANN, at the moment, although a transition is*
13 *going to happen soon, is overseen by the U.S. Department of*
14 *Commerce through these contracts, and the contracts state that*
15 *ICANN basically has to follow its own rules. So that was our*
16 *point in bringing in the contracts, and we wanted someone to*
17 *testify as to, you know, again, how does ICANN see that*
18 *relationship? How does ICANN see the statement it made*
19 *regarding the fact that it doesn’t have to follow the rules as*
20 *compared to this contract it has with the U.S. Department of*
21 *Commerce that says “You have to follow your rules when you*
22 *make decisions about gTLD applicants”?*

23 (LeVee Decl., Ex. 2 [Hrg. Tr. at 81:20-82:12] (emphasis added).)

24 In other words, Plaintiff was well aware of all of the relevant facts
25 concerning ICANN’s relationship with the U.S. Government long before this
26 August 23, 2016 hearing (and before Plaintiff served ICANN with the Rule
27 30(b)(6) deposition notice on May 20, 2016, *see* ECF No. 121-2 ¶ 2), yet never
28 suggested to the Court that Plaintiff intended to raise a due process claim. This

1 failure is fatal to the Motion. Even after it became clear at the August 23 hearing
2 that Plaintiff would not be entitled to discovery related to ICANN’s contracts with
3 the U.S. Government because no claim was relevant to those requests, Plaintiff *still*
4 did not mention any potential due process claim. The only reasonable explanation
5 is that Plaintiff did not, at that time, have any intention of adding such a frivolous
6 claim. Rather, Plaintiff concocted the idea to add the Due Process Claim only once
7 it became clear that doing so would be the only way to preserve federal jurisdiction.
8 This conduct utterly fails to meet the requisite level of diligence to permit an
9 amendment to the Scheduling Order. *See Laureate, Inc.*, 186 F.R.D. at 608
10 (denying motion for leave to amend because a plaintiff must “collaborate with the
11 district court in managing the case” and must “alert the Rule 16 scheduling judge of
12 the nature and timing of such anticipated amendments” in their filings).

13 Plaintiff’s lack of diligence in seeking the amendment alone precludes the
14 Motion from being granted. *Johnson*, 975 F.2d at 609 (9th Cir. 1992) (if the party
15 moving for leave to amend does not show that it meets the Rule 16(b) “good cause”
16 standard, “the inquiry should end” and the motion should be denied).

17 **B. THE MOTION MUST BE DENIED UNDER RULE 15(a)**
18 **BECAUSE PLAINTIFF CANNOT SHOW THAT JUSTICE**
19 **REQUIRES PERMITTING THE AMENDMENT.**

20 The Court considers five factors in deciding whether to grant leave to amend
21 a complaint under Rule 15(a): “(1) bad faith, (2) undue delay, (3) prejudice to the
22 opposing party, (4) futility of amendment; and (5) whether plaintiff has previously
23 amended his complaint.” *Allen*, 911 F.2d at 373. All five factors militate in favor
24 of denying Plaintiff’s Motion.

25 **1. Plaintiff Proposes The Amendment In Bad Faith Because It**
26 **Is An Attempt To Artificially Create Federal Subject Matter**
Jurisdiction.

27 Plaintiff has brought the Motion in bad faith because it comprises a
28 transparent bid to artificially create federal subject matter jurisdiction.

1 Longstanding principles of jurisprudence dictate that “[o]f course, the Federal
2 question must not be merely colorable or fraudulently set up for the mere purpose
3 of endeavoring to give the court jurisdiction.” *Siler v. Louisville & Nashville R.*
4 *Co.*, 213 U.S. 175, 191–92 (1909). Indeed, the Ninth Circuit has squarely held that
5 “plaintiff tampers with the jurisdiction of the court by artificially affecting it.”
6 *Attorneys Tr. v. Videotape Comput. Prods., Inc.*, 93 F.3d 593, 595 (9th Cir. 1996).

7 Plaintiff first indicated that it considered the proposed amendment on
8 September 27, 2016, the day it filed its supplemental brief regarding ZACR’s
9 indispensability. (ECF No. 137 at 4 n.2.) That timing is no coincidence. If the
10 proposed Due Process Claim had been brought in good faith, Plaintiff would have
11 investigated facts relevant to it *before* filing the original complaint, or at least prior
12 to the Scheduling Order’s deadline to amend the pleadings. Instead, Plaintiff
13 waited until the jurisdictional writing was on the wall and the Court seemed poised
14 to remand the matter to state court. *See generally Erum v. Cty. of Kauai*, No. 08-
15 00113 SOM-BMK, 2008 U.S. Dist. LEXIS 22647 (D. Haw. Mar. 20, 2008).

16 The case of *Erum v. County of Kauai* is instructive. There, as here, the
17 plaintiff filed suit in state court, and the state court denied a request for a temporary
18 restraining order. *Id.* at *5. When the plaintiff brought suit in federal court, the
19 “Complaint was dismissed [without prejudice] because, although premised on
20 diversity jurisdiction, it lacked complete diversity.” *Id.* at *8. Just like Plaintiff
21 here, the plaintiff in *Erum* attempted to artificially create subject matter jurisdiction
22 by pleading a federal question claim in its amended complaint. The district court
23 dismissed the action because “[t]he history of this case . . . demonstrate[s] that
24 [plaintiff], in asserting ‘federal’ claims in his Amended Complaint, is merely
25 attempting to manufacture federal question jurisdiction. . . . [H]is claims, while
26 citing federal statutes, are immaterial, insubstantial, and frivolous, and made solely
27 for the purpose of manufacturing federal question jurisdiction[.]” *Id.* at *2.

28 The history of this case similarly shows that Plaintiff’s true and only

1 motivation for seeking to add the Due Process Claim is to manufacture subject
 2 matter jurisdiction. Indeed, Plaintiff's first reference to any such amendment (in its
 3 September 27 brief) admitted as much: "DCA intends shortly hereafter to file a
 4 motion for leave to amend to add a Fifth Amendment claim for violation of due
 5 process . . . if DCA amends the complaint to add this claim, the Court will have
 6 federal question jurisdiction over the matter, mooting the question of ZACR's
 7 indispensability." (ECF No. 137 at 4 n.2.) Such efforts to manufacture jurisdiction
 8 should not be countenanced, and the Motion should be denied on this grounds as
 9 well. *See Erum*, 2008 U.S. Dist. LEXIS 22647, at *11-12 ("The court can only
 10 conclude that [plaintiff] seeks to manufacture subject matter jurisdiction in this
 11 action.").

12 **2. Plaintiff Unduly Delayed In Seeking To Amend The** 13 **Complaint.**

14 "A motion to amend a complaint may be denied if there is undue delay."
 15 *Burns v. Cty. of King*, 883 F.2d 819, 823 (9th Cir. 1989). Plaintiff's undue delay in
 16 proposing this amendment is evident when considering three timing issues:
 17 (1) whether Plaintiff could have alleged the claim in its original pleading (it could
 18 have); (2) whether Plaintiff unduly delayed in proposing the amendment after
 19 discovering the relevant facts (it did); and (3) the time that has elapsed since the
 20 Scheduling Order's deadline (over two months).

21 *First*, "[r]elevant to evaluating the delay issue is whether the moving party
 22 knew or should have known the facts and theories raised by the amendment in the
 23 original pleading." *Bank of Haw.*, 902 F.2d at 1388; *see also AmerisourceBergen*
 24 *Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006)). Plaintiff fails to
 25 explain why it could not have alleged this claim at the time it originally filed suit or
 26 at the time it filed the FAC, which shows not only that there is no good cause to
 27 amend the Scheduling Order under Rule 16(b) but also that Plaintiff unduly delayed
 28 in filing the Motion. *See Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir.

1 2002) (affirming denial of a motion for leave to amend because the facts supporting
2 the amendment “had been available to [the plaintiff] even before the first
3 amendment to his complaint”).

4 *Second*, the time between Plaintiff’s discovery of the facts relevant to the
5 proposed amendment and the filing of the motion for leave to amend is relevant to a
6 finding of undue delay. *See AmerisourceBergen Corp.*, 465 F.3d at 953 (“an eight
7 month delay between the time of obtaining a relevant fact and seeking a leave to
8 amend is unreasonable”). Here, Plaintiff has not indicated when it became aware of
9 the facts relevant to its Due Process Claim, but it is evident that such information
10 was publicly available for years, and long before the August 1 amendment deadline.
11 The documents and facts that Plaintiff relies upon in its Motion relating to
12 ICANN’s contracts with the U.S. Government were undeniably publicly posted and
13 available *prior* to the filing of its *original* complaint, let alone the amendment
14 deadline. (Mot. at 1-4, 12.) As such, Plaintiff unduly delayed in filing the Motion.
15 *See Osakan v. Apple Am. Grp.*, No. C08-4722 SBA, 2010 U.S. Dist. LEXIS 53830,
16 at *9–12 (N.D. Cal. May 3, 2010) (denying leave to amend where amendments
17 were offered to cure a class defect that the plaintiff was aware of at least six months
18 before the motion to amend); *ExperExch., Inc. v. Doculex, Inc.*, No. C-08-03875
19 JCS, 2009 U.S. Dist. LEXIS 112411, at *85–86 (N.D. Cal. Nov. 16, 2009) (denying
20 leave to amend because the plaintiff “waited two months after discovering its
21 allegedly ‘new’ facts to bring its motion to amend”).

22 *Third*, the length of time that has elapsed since the deadline to amend the
23 pleading is also relevant, and the delay of months is sufficient to find denial of
24 leave to amend is warranted based on delay. *Lockheed Martin Corp. v. Network*
25 *Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (affirming trial court’s ruling that
26 delay weighed against permitting amendment because the plaintiff’s “motion to
27 amend came several months after the stipulated deadline for amending . . .”).
28

1 3. **ICANN Would Be Severely Prejudiced Were The Motion**
2 **Granted.**

3 Of the five-factor test courts use to assess whether leave to amend is
4 warranted under Rule 15(a), “prejudice to the opposing party carries the greatest
5 weight.” *Bever*, 2014 U.S. Dist. LEXIS 54390, at *26 (citing *Eminence Capital,*
6 *LLC*, 316 F.3d at 1052). ICANN would be severely prejudiced were the Court to
7 permit the proposed amendment, for two reasons.

8 *First, there is no possibility that the existing schedule can be maintained if*
9 *the Motion is granted.* The earliest the Motion can be heard is the date for which
10 Plaintiff noticed it, namely November 7, 2016. (ECF No. 138.) That date falls
11 mere weeks before the close of discovery, leaving ICANN no time to file a motion
12 to dismiss the claim, let alone conduct discovery or file a motion for summary
13 judgment in connection with it. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080,
14 1087 (9th Cir. 2002) (affirming district court’s denial of motion to amend pleadings
15 filed five days before close of discovery where additional causes of action would
16 have required delaying the proceedings). Similarly, the December 13, 2016 motion
17 cutoff and the February 28, 2017 trial dates would need to be vacated, also
18 weighing in favor of denying the Motion. *Bever*, 2014 U.S. Dist. LEXIS 54390, at
19 *31 (prejudice found where the proposed amendment would require “an extension
20 of all the remaining deadlines”).

21 *Second*, the parties would undoubtedly need to conduct additional discovery,
22 comprising yet another reason the Motion should be denied. *See Bank of Haw.*, 902
23 F.2d at 1387 (affirming denial of motion for leave to amend because the proposed
24 “additional claims advance different legal theories and require proof of different
25 facts”); *Zivkovic.*, 302 F.3d at 1087 (affirming denial of motion to amend filed five
26 days before close of discovery where additional claims required additional
27 discovery). Indeed, adding a constitutional claim to the dispute where none was
28 previously pled “would . . . greatly alter[] the nature of the litigation” and would

1 require ICANN to undertake “an entirely new course of defense” (including but not
2 limited to rebutting the notion that it is a governmental actor). *See Morongo Band*
3 *of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (affirming denial
4 of leave to amend where plaintiff sought to add federal question claims for the first
5 time).

6 Recognizing that the need for additional discovery in connection with the
7 proposed amendment dooms its Motion, Plaintiff blithely asserts that “ICANN will
8 have limited discovery to conduct, if any at all, related to this proposed cause of
9 action[.]” (Mot. at 8.) Plaintiff is mistaken (and in any event it is not for Plaintiff
10 to decide or predict whether ICANN would propound discovery in connection with
11 claims brought against it). The adjudication of the proposed Due Process Claim
12 may involve issues other than ICANN’s relationship with the U.S. Government,
13 and even obtaining facts on that issue may require formal discovery (including
14 possibly from the Government itself); as such, ICANN would suffer prejudice
15 sufficient to deny the Motion. Indeed, Rule 30(b)(6) depositions are currently
16 underway, and might need to be reopened at the parties’ great inconvenience, to
17 permit discovery into Plaintiff’s Due Process Claim.

18 In sum, ICANN would suffer prejudice were the Motion granted, given the
19 need for vacating the remaining dates set forth in the Scheduling Order as well as
20 additional discovery. As such, the Motion should be denied.

21 **4. The Proposed Amendment Is Unquestionably Futile.**

22 The Motion must be denied because permitting Plaintiff to add the Due
23 Process Claim would be futile. *See Zinman v. Wal-Mart Stores, Inc.*, No. 09-02045
24 CW, 2010 U.S. Dist. LEXIS 62826, at *5 (N.D. Cal. June 1, 2010) (“[f]utility, *on*
25 *its own*, can warrant denying leave to amend.”) (emphasis added). Indeed, “[w]here
26 the legal basis for a cause of action is tenuous, futility supports the refusal to grant
27 leave to amend.” *Lockheed Martin Corp.*, 194 F.3d at 986.

28

1 **(a) ICANN Is Not a Governmental Actor.**

2 To start, the claim fails as a matter of law because Plaintiff does not and
3 cannot plausibly (and in good faith) allege that ICANN, a private, non-
4 governmental corporation, is a federal actor subject to the Fifth Amendment. In
5 other words, no equitable relief is available against ICANN in connection with a
6 Fifth Amendment claim, because it is a private entity,⁵ and courts treat private
7 entities as federal actors only in narrow circumstances, none of which apply here.

8 In fact, the Ninth Circuit has expressly held that “ICANN . . . is not a
9 government actor.” *McNeil v. Verisign, Inc.*, 127 Fed. App’x 913, 914 (9th Cir.
10 2005) (dismissing First Amendment claim against ICANN on state action grounds).
11 The District Court of the Southern District of New York reached the same
12 conclusion in a published ruling, holding: “ICANN is not a governmental body.”
13 *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238, 247 (S.D.N.Y. 2000), *aff’d* 356
14 F.2d 393 (2d Cir. 2004) (emphasis added). As the court explained, “the
15 Department of Commerce’s establishment of ICANN signified a movement away
16 from nascent public regulation of the Internet and toward a consensus-based *private*
17 ordering regime.” *Id.* (emphasis added).⁶

18 Viewed generously, Plaintiff’s Motion argues that ICANN should be treated
19 as a federal actor for two reasons: (1) on account of ICANN’s supposed “close
20 nexus” with the Government; and (2) because ICANN performs a public function.
21 (Mot. at 2-5, 11-13.) But Plaintiff does not and cannot plead facts showing that
22 ICANN is a governmental actor in either respect.

23
24 ⁵ To the extent Plaintiff seeks *Bivens*-type damages, that remedy is squarely
25 foreclosed by *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). There,
the Court held that its precedent “forecloses the extension of *Bivens* to private
entities” as distinguished from federal employees. *Id.* at 66–68 & n.2.

26 ⁶ Another federal court in this circuit has reached similar conclusions, noting
27 that “there is no authority for the proposition that ICANN policies have the force of
28 law.” *Frogface v. Network Sols., Inc.*, No. C-00-3854 WHO, 2002 U.S. Dist.
LEXIS 2594, at *9-10 (N.D. Cal. Jan. 14, 2002).

1 (i) **The Nexus Between The U.S. Government And**
 2 **The Challenged Conduct Is Not Sufficiently**
 3 **Close That ICANN Could Be Deemed A Federal**
 4 **Actor.**

5 “[S]tate action may be found if, though only if, there is such a ‘close nexus
 6 between the State and the challenged action’ that seemingly private behavior ‘may
 7 be treated as that of the State itself.’” *Brentwood Acad. v. Tenn. Secondary Sch.*
 8 *Athletic Ass’n*, 531 U.S. 288, 295 (2001) (citations omitted); *Morse v. N. Coast*
 9 *Opportunities, Inc.*, 118 F.3d 1338, 1342 (9th Cir. 1997) (“the standard for
 10 determining the existence of federal government action can be no broader than the
 11 standard applicable to State action under § 1983”). The closeness of an alleged
 12 governmental nexus rests on whether: “(1) the organization is mostly comprised of
 13 state institutions; (2) state officials dominate decision making of the organization;
 14 (3) the organization's funds are largely generated by the state institutions; and
 15 (4) the organization is acting in lieu of a traditional state actor.” *Villegas v. Gilroy*
Garlic Festival Assoc., 541 F.3d 950, 955 & n.4 (9th Cir. 2008) (en banc).

16 No set of facts could be pled to show that the “nexus” between ICANN and
 17 the U.S. Government is sufficiently “close” to meet this standard. As an initial
 18 matter, the Motion describes ICANN’s relationship with the U.S. Government in a
 19 manner that is patently false (as Plaintiff perhaps recognizes since the Motion’s
 20 erroneous statements are *not* alleged in the PSAC, and the Motion cites no evidence
 21 or other authority to support its false statements). For example, the Motion
 22 wrongly states that “the U.S. Government . . . sits on ICANN’s Board” (Mot. at 12)
 23 even though ICANN’s Bylaws actually forbid any governmental official from
 24 sitting on ICANN’s Board and, as such, the U.S. Government has never done so.⁷

25 Leaving aside the false statements Plaintiff included in its Motion, the sum
 26 total of the PSAC’s allegations regarding the U.S. Government’s connection to

27 ⁷ ICANN Bylaws § 7.4(a), *available at*
 28 https://www.icann.org/resources/pages/governance/bylaws-en/#_Ref444606439.

1 ICANN are that: (a) ICANN is a party to a contract, which has now expired, under
 2 which ICANN provided technical-parameter-assignment services, including making
 3 recommendations to the Government about delegations and redelegations of top-
 4 level domains⁸; and (b) the U.S. Government is a member of ICANN’s
 5 Governmental Advisory Committee (“GAC”) *along with 100 other governments*.
 6 (*See* PSAC ¶¶ 138-46; *id.* ¶ 45 (“Membership on the GAC is open to all
 7 representatives of all national governments”).)⁹ Neither allegation meets the “close
 8 nexus” requirement described *supra*.

9 As to the contractual relationship between ICANN and the U.S. Government,
 10 Plaintiff alleges that “ICANN’s provision of the IANA function is pursuant to its
 11 contract with the U.S. government.” (ECF No. 138-1 ¶ 141.) Yet governmental
 12 regulation, by contract or otherwise, does not convert the regulated entity into a
 13 government actor. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (“Acts of . . .
 14 private contractors do not become acts of the government by reason of their
 15 significant or even total engagement in performing public contracts.”); *Caviness v.*
 16 *Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 816 (9th Cir. 2010) (“[t]he
 17 Supreme Court has repeatedly held that ‘the mere fact that a business is subject to
 18 state regulation does not by itself convert its action into that of the State.’” (citation
 19 omitted)).

20 As to the GAC, the PSAC alleges that “the U.S. Government maintains
 21 active involvement in ICANN’s review of gTLD applications through its seat on
 22 ICANN’s GAC.” (ECF No. 138-1 ¶ 142.) The GAC advises ICANN “on the
 23 activities of ICANN as they relate to concerns of governments.”¹⁰ Membership on
 24 a committee that *advises* ICANN is no basis to deem ICANN’s actions to be actions

25 _____
 26 ⁸ See PSAC, Ex. A [IANA Contract § C.9.2.9d].

27 ⁹ See also <https://gacweb.icann.org/display/gacweb/GAC+Representatives>.

28 ¹⁰ ICANN Bylaws, § 12.2(a)(1),
https://www.icann.org/resources/pages/governance/bylaws-en/#_Ref444421344.

1 of the U.S. Government. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999)
 2 (“[a]ction taken by private entities with the mere approval or acquiescence of the
 3 State is not state action.”).

4 Notably, Plaintiff does not propose to allege that either ICANN’s
 5 performance of the IANA functions or the U.S. Government’s GAC membership
 6 relate to the ICANN conduct Plaintiff challenges in this action. Accordingly, the
 7 proposed Due Process Claim must fail because in order to deem ICANN’s actions
 8 as governmental, the law requires that the “close nexus” must be “between the
 9 [Government] and the challenged action[.]” *Jackson v. Metro. Edison Co.*, 419
 10 U.S. 345, 351 (1974) (emphasis added).

11 **(ii) ICANN Performs No Governmental Function**
 12 **That Would Permit It To Be Treated As A**
 13 **Federal Actor.**

14 Next, Plaintiff alleges that ICANN is a federal actor because it provides a
 15 “governmental function.” (PSAC ¶ 143.) But the factual allegations pled in
 16 support of that legal conclusion are limited to ICANN performing a “*public*
 17 function.” (PSAC ¶ 140 (emphasis added).) That “a private entity performs a
 18 function which serves the public does not make its acts state action.” *Rendell-*
 19 *Baker*, 457 U.S. at 842. Importantly, for a private entity to be deemed a
 20 governmental actor because it performs a “public function[.]” the challenged
 21 function must be “both traditionally and exclusively governmental.” *Lee v. Katz*,
 22 276 F.3d 550, 554–55 (9th Cir. 2002). This test is difficult to satisfy—as the
 23 Supreme Court observed in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157–58
 24 (1978): “While many functions have been traditionally performed by governments,
 very few have been ‘exclusively reserved to the State.’” (citation omitted).

25 With respect to top-level domains (such as AFRICA in .AFRICA), ICANN
 26 started receiving TLD applications in 2000, and in 2001 ICANN, not the U.S.
 27 Government, began contracting with registry operators and recommending that
 28 TLDs be added to the root zone. *See name.space, Inc. v. Internet Corp. for*

1 *Assigned Names & Nos.*, 795 F.3d 1124, 1128 (9th Cir. 2015). Then, the U.S.
 2 National Telecommunications and Information Administration verified that changes
 3 to the root zone met ICANN’s procedures before authorizing those changes,¹¹ but
 4 even that role ended when the last IANA functions contract expired on September
 5 30, 2016.¹² In short, there is no plausible basis to allege that contracting for or
 6 establishing Internet domains is “both traditionally and exclusively governmental.”

7 The proposed Due Process Claim has no chance of stating a cognizable claim
 8 for relief because ICANN is not a federal actor. Accordingly, as the proposed
 9 amendment is futile, leave to amend should be denied. *See, e.g., Dev v. Donahoe*,
 10 No. 2:12-cv-3026-JAM-EFB PS, 2014 U.S. Dist. LEXIS 56037, at *5–6 (E.D. Cal.
 11 Apr. 22, 2014), *adopted by* 2014 U.S. Dist. LEXIS 89037, at *1 (E.D. Cal. June 27,
 12 2014) (denying motion for leave to add claim arising under U.S. Constitution
 13 because “it is apparent from the face of both the existing and proposed amended
 14 complaints that the defendants . . . were not state actors or otherwise acting under
 15 color of state law”).

16 **(b) Even If ICANN Were Deemed A Governmental Actor,**
 17 **The Proposed Amendment Is Otherwise Futile.**

18 Even assuming for purposes of this Motion that ICANN might be deemed a
 19 governmental actor (which it is not), the proposed amendment is futile for
 20 additional and independent reasons as well.

21 To start, the Court must make the threshold determination of whether
 22 Plaintiff had any interest in property or liberty sufficient to trigger the due process
 23 protections of the Fifth Amendment. *See Bd. of Regents of State Colls. v. Roth*, 408
 24 U.S. 564, 569 (1972). The PSAC attempts to claim a violation of Plaintiff’s
 25

26 ¹¹ *See* ECF 138-1 at 48 (showing the process flow for changes prior to
 expiration of the IANA contract on September 30, 2016).

27 ¹² *See* [https://www.ntia.doc.gov/press-release/2016/statement-assistant-
 28 secretary-strickling-iana-functions-contract](https://www.ntia.doc.gov/press-release/2016/statement-assistant-secretary-strickling-iana-functions-contract).

1 property (not liberty) rights insofar as the claim seeks “fair review of its .Africa
 2 application.” (PSAC ¶ 145.) Property rights cognizable under the Constitution “are
 3 created and their dimensions are defined by existing rules or understandings that
 4 stem from an *independent source such as state law* -- rules or understandings that
 5 secure certain benefits and that support claims of entitlement to those benefits.”
 6 *Roth*, 408 U.S. at 577. Nothing in the PSAC or the Motion plausibly suggests any
 7 constitutionally cognizable property interest in the right to operate .AFRICA (as
 8 there is no such right), rendering the Due Process Claim defective at the outset.

9 Moreover, Plaintiff’s allegations do not plausibly suggest that ICANN’s
 10 conduct did not afford Plaintiff due process, which generally requires notice and an
 11 opportunity to be heard.¹³ *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In
 12 *Mathews*, the Supreme Court set forth a three-factor balancing test to determine the
 13 procedures that are required to satisfy due process: (1) the interest at stake; (2) the
 14 risk of “erroneous deprivation” through the procedures employed; and (3) the
 15 “fiscal and administrative burdens” that additional procedural safeguards would
 16 entail. *Id.* at 335. Plaintiff offers no argument whatsoever as to how its allegations,
 17 even if taken as true could possibly satisfy this standard, instead devoting its entire
 18 argument regarding futility to asserting that ICANN is a governmental actor. (*See*
 19 *Mot.* at 11-12.) Plaintiff does not allege that it lacked notice of *any* stage in the
 20 processing of its application for .AFRICA (“Application”), nor that it was not
 21 allowed to be heard either during the IRP or in this Court.

22 **5. Plaintiff Has Already Amended Its Complaint.**

23 Plaintiff has already amended its complaint (ECF No. 10), which weighs
 24 against permitting the proposed amendment. *See Ascon Props., Inc.*, 866 F.2d at
 25

26 ¹³ The PSAC and the Motion are not in accord as to the type of due process
 27 claim Plaintiff proposes; the PSAC alleges violations *only* of “procedural due
 28 process rights” (PSAC ¶ 146) whereas the motion discusses *only* a claim for
 “substantive due process rights” (*Mot.* at 10-11).

1 1160 (affirming denial of motion for leave to amend complaint and noting that
2 “[t]he district court’s discretion to deny leave to amend is particularly broad where
3 plaintiff has previously amended the complaint”).¹⁴

4 **V. CONCLUSION**

5 Because there is no “good cause” to amend the Scheduling Order under Rule
6 16(b), and Plaintiff does not meet the standard for leave to amend the FAC set forth
7 in Rule 15(a), the Motion should be denied.

8
9 Dated: October 17, 2016

JONES DAY

10
11 By: /s/ Jeffrey A. LeVee
12 Jeffrey A. LeVee
13 Attorneys for Defendant
14 INTERNET CORPORATION FOR
15 ASSIGNED NAMES AD NUMBERS
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25 _____
26 ¹⁴ Moreover, Plaintiff has not shown that it was unaware of any relevant facts it
27 claims support the proposed amendment prior to the filing of its FAC. As such, the
28 Motion must be denied. *Chodos*, 292 F.3d at 1003 (affirming trial court’s denial of
motion for leave to amend where the relevant “facts had been available to [plaintiff]
even *before the first amendment* to his complaint”) (emphasis added).